MOTION FILED
MAY 30 1991

Nos. 90-1205, 90-6588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAKE AYERS, JR., *et al.*,

Petitioners,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

RAY MABUS, Governor,
State of Mississippi, *et al.*,

Respondents.

**On Writ Of Certiorari To
The United States Court of Appeals
For The Fifth Circuit**

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL BAR ASSOCIATION, THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION AND THE CONGRESSIONAL BLACK CAUCUS AMICI CURIAE IN SUPPORT OF PETITIONER

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The National Bar Association, the National Association for Equal Opportunity in Higher Education and the Congressional Black Caucus respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Petitioners. The

Petitioners, Jake Ayers, Jr., *et al*, and the United States have granted consent to the filing of this brief. Since May 2, 1991, several efforts have been made to secure consent from the Respondent, Ray Mabus, Governor of the State of Mississippi. As of the date of the filing of this brief, the State of Mississippi has neither granted nor denied consent.

Respectfully submitted,

/s/ J. Clay Smith, Jr.

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QUESTION PRESENTED

Whether a state that has maintained a *de jure* and *de facto* system of segregation in publicly supported institutions of higher education has a continuing obligation to administer its education programs in ways calculated to undo and correct the present effects of its past discriminatory actions?

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CONSENT OF THE PARTIES

Petitioners and the United States have consented to the filing of this brief. The Respondent has neither granted nor denied consent to the filing of this brief.

INTEREST OF AMICI CURIAE

The National Bar Association (NBA) was founded in 1925, and is an organization comprised of 20,000 Black lawyers, many of whom are graduates of historically Black colleges and universities across the United States. Since its founding, NBA has been involved in promoting civil rights activities to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. NBA, for almost seventy years, has actively participated in the formation of this nation's legislative and judicial policy affecting the educational advancement and opportunities of minority and disadvantaged youth and young adults of the nation.

The National Association for Equal Opportunity in Higher Education (NAFEO) was founded in 1969, and is an association comprised of the presidents of over one hundred historically Black public and private colleges and universities located in the United States. Collectively, these schools, many established prior to the Civil War and thereafter, have graduated hundreds of thousands of Black and white Americans and other minorities whose voices are also represented by NAFEO. NAFEO was established to advance the high aims of educating Black Americans who were denied an equal opportunity to obtain an education at the post-secondary level as a result of the vestiges of *de jure* and *de facto* segregation. NAFEO members are committed to the goal of educating the students who attend its colleges and universities, and are dedicated to providing financial and human resources necessary for achieving this goal. NAFEO has a unique interest in this litigation as, through its membership, the alumni, and faculties of member HBCUs, who seek to promote the widest

possible sensitivity to the complex factors involved and the institutional commitment required to create successful higher education opportunities for students from groups exposed to the vestiges of racism and neglect imposed by various states and by other institutions of the nation.

The Congressional Black Caucus (CBC) was founded in 1970 by thirteen Black members of the United States House of Representatives to assure that the interests of Black and minority Americans would be heard and to influence legislative policies touching all aspects of America. Today there are twenty-four members of CBC who are vitally concerned about the educational opportunities of Black Americans, particularly at the university and college level and in all of the professional schools. Historically, CBC is and has been concerned about the survival of the HBCUs, and mindful of the disparate funding of these institutions, and the impact of such discrimination on the faculties, students and the citizens without a choice or an alternative to higher education.

STATEMENT OF CASE

Amici adopt the Statement of the Case as presented by the Petitioners.

SUMMARY OF ARGUMENT

The State of Mississippi must be held accountable for its continuing discriminatory acts. The state has historically engaged in disparate treatment of students and faculty of its historically Black colleges and universities. The areas of such conduct include state funding, program offerings, facilities, and faculty salaries.

The State of Mississippi in accordance with the mandate of this Court has an affirmative duty to correct its dual educational system of higher learning. That obligation can-

not be accomplished by instituting "good faith, race-neutral policies and procedures." Without correcting the present effects of past discrimination, the vestiges of the state's well-documented dual educational system are "grandfathered," and as a result, the Equal Protection guarantees of Black Mississippians are denied.

Over a period of two decades, Democratic and Republican Presidents of the United States, HEW, and Congresses have advanced initiatives to strengthen historically Black colleges and universities. The underlying historical and policy reasons for the initiatives, including the findings of Congress that the federal government and the states are partly responsible for discriminatory action against Black colleges and universities, should be accorded great weight.

ARGUMENT

I. THE STATE OF MISSISSIPPI IS LIABLE FOR ITS CONTINUING DISCRIMINATORY ACTS

> *"In educational policy, let the Negro have the crumbs that fall from the white man's table."*[1]

This quote by the Dean of the Department of Education of the University of Mississippi in 1914, exemplifies the state's overall treatment and attitude toward the students and faculty of the Historically Black Colleges and Universities ("HBCUs")[2] that have become fixtures in the

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[1] G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE IND 298 (1971) (quoting T. BAILEY, RACE ORTHODOX IN THE SOUTH, AND OTHER ASPECTS OF THE NEGRO QUESTION 93 (1914)).

[2] The term "historically black college or university" is preferred here to "predominantly" or "traditionally" Black colleges and universities because it defines both legally and precisely the class of institutions—100 in number—to which the federal law refers in section 322(b) of the Higher Education Act (20 U.S.C. § 1061 (Supp. 1991)) as being "established prior to 1964." Amici also use, throughout this brief, HBCU as inclusive of students, faculty and alumni of such institutions.

public university system in the State of Mississippi.[3] That system consists of eight educational institutions, and several other entities under the jurisdiction of the Board of Trustees of State Institutions of Higher Learning ("Board of Trustees"). The Board was created by statute in 1932. Five of the eight Historically White Institutions ("HWIs") were chartered solely for the purpose of educating white students: the University of Mississippi, Mississippi State University, the University of Southern Mississippi, Mississippi University for Women, and Delta State University. Three institutions were chartered to educate Black students: Jackson State University, Alcorn State University, and Mississippi Valley State University.[4] *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) (*Ayers I*), *aff'd and remanded*, 893 F.2d 732 (5th Cir.) (*Ayers II*), *aff'd on reh'q*, 914 F.2d 676 (5th Cir. 1990) (en banc) (*Ayers III*).

When this Court rendered its decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (*Brown I*), Mississippi became constitutionally required to dismantle its dual system, and eliminate all vestiges of its racially discriminatory educational system. *See also Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (*Brown II*); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 18 (1971). A fact established by the district court judge in *Ayers I* is the Board of Trustees' finding in 1954 that the Board was engaged in discriminatory activities to the detriment of the students and faculty at the HBCUs. Specifically, in 1954, the Board of Trustees issued the Brewton Report, entitled "Higher Education in Missis-

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[3] Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 67 (1987) (hereinafter *Equal Opportunity in Higher Education*).

[4] *See* U.S. COMMISSION ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 13 (1960). *See also* Bell, *Black Colleges and the Desegregation Dilemma*, 28 EMORY L. J. 949, 951-54 (1979).

sippi." It described disparities and differences in opportunities available to Black and white college and university students in Mississippi. The Report stated that educational opportunities available to Black students were limited to teacher education, agriculture, mechanical and the practical arts, and trades. In comparison, the HWIs offered undergraduate, graduate and professional studies, and exceptional facilities.

In 1974, the Board of Trustees recognized its discriminatory activities, and promised to remedy the effects of its longstanding misconduct. The Board of Trustees submitted a "Plan of Compliance" ("Plan") to the United States Department of Health, Education and Welfare ("HEW"). *Ayers I*, 674 F. Supp. at 1530. The Plan projected "opposite race student enrollment" and faculty and student hiring for each of the state institutions, emphasized the importance of implementing desirable programs for attracting students to the state college system, "placed a high priority on strengthening existing programs at the three historically black institutions, and promised priority for such institutions for new programs." *Id.* In addition, the Plan described methods for "eliminating the competition experienced by Jackson State University and Alcorn State University" posed by the operation of satellite campuses of two HWIs located in close proximity to those HBCUs. *Id.* The Plan further provided that special state legislative appropriations would be sought to implement the Plan's stated objectives. *Id.* The Board of Trustees adopted the Plan and required officials at each of the eight institutions to take measures to effectuate the Plan's goals and projections.[5]

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[5] Notwithstanding the Board of Trustees' promises outlined in the Plan, the proposal was inevitably rejected by HEW and was never fully funded or implemented by the Board. *See Ayers I*, 674 F. Supp. at 1530.

Notwithstanding the forewarnings of the Brewton Report in 1954 and the projected goals of the Plan, disparities between the HWIs and the HBCUs are just as apparent today as they were thirty years ago.[6] As the district court judge found in *Ayers I*, the Board of Trustees' disparate treatment of the HBCUs in the areas of state funding, faculty salaries, facilities, and competing satellite campuses prevents HBCUs from operating at their full potential and attracting a diversity of students to their doors. The state's denial of resources to the HBCUs has served to perpetuate a dual system, that is, a set of five institutions predominately comprised of white students, and three institutions which are underfunded and predominately comprised of Black students.

A. Mission Designations

The Board of Trustees' dual system is further facilitated by "Mission Statements" by the Board released in 1981. These Statements imposed categorical designations on all eight institutions and were used by the Board of Trustees to "define the role and scope of its public universities." *Ayers I*, 674 F. Supp. at 1539. The Statements classified each public educational institution as either comprehensive, urban, or regional.[7] The Fifth Circuit found that the Board of Trustees used these designations to justify the disparate differences in funding, program offerings, and facilities at the Mississippi colleges and universities. *Ayers II*, 893 F.2d

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[6] *See generally*, Thornton, *Symbolism at Ole Miss and the Crisis of Southern Identify*, 86 S. ATL. Q. 255 (Summer 1987) ("Because Ole Miss functions almost as sacred ground it must not be profaned; a change in ritual, in tradition, separates the present from the past. . . . Those who are possessed of this feeling are somehow bound by it; it becomes a commitment, a promise, an oath to be honored with 'faithful fidelity.' Tradition is treated with solemnity because it serves a nearly religious function; to break it is to lose the connection with the past and the identity which results from this union." [footnote omitted]); Henry, *Ole Miss: Evolution of Racism's Sound and Fury*, Wash. Post., Oct. 5, 1986, at 1, col. 2.

[7] *See Ayers I*, 674 F. Supp. at 1539-40.

at 752-53.[8] While the Board of Trustees' mission designations were based upon conditions at each of the institutions in 1981, the designations in fact mirrored and perpetuated the inequalities that had historically existed among the state's institutions.

Under Mississippi's dual system, the missions outlined for the state's HBCUs are quite limited.[9] The Board of Trustees alleges that the designated classifications are based on the number and level of degree programs offered by the institutions, the fields in which degrees are granted, the extent to which an institution conducts and receives

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[8] *See Equal Opportunity in Higher Education*, *supra*, at 44-81 (the division of funds between Black and white public colleges demonstrated a total disregard for the advancement of the Black population; deficiencies in funding were matched by deficiencies in educational programs).

[9] *See generally*, NATIONAL ADVISORY COMMITTEE ON BLACK HIGHER EDUCATION AND BLACK COLLEGES AND UNIVERSITIES, BLACK COLLEGES AND UNIVERSITIES: AN ESSENTIAL COMPONENT OF A DIVERSE SYSTEM OF HIGHER EDUCATION 36 (1979) (The academic programs at the HBCUs were linked closely to the types of jobs that Black graduates were permitted to hold in a lawfully segregated society).

To qualify for admission into the Mississippi public university system, students are required to take a standardized test given by the American College Testing Program ("ACT"). The Board of Trustees has established minimum scores that must be achieved to qualify for admission into one of its eight institutions. A minimum of a 15 ACT composite score is required for automatic admission to five of the HWIs: Delta State for Women, the University of Mississippi, and the University of Southern Mississippi. Up to 5% of the students in an incoming class may be admitted with scores of less than 15. This policy is to accommodate talented or high risk students. Jackson State University and Mississippi Valley University requires a minimum score of 13. The HBCUs afford substantial opportunity to enter higher education to those who score as low as 9 on the ACT. *See Ayers I*, 674 F. Supp. at 1533-34. In that regard, the HBCUs offer educational opportunities to students that might otherwise not qualify for admission into any state institution of higher learning in the state.

funding for research, and areas of public service responsibility. *Ayers I*, 674 F. Supp. at 1539. Three HWIs were designated by the Board of Trustees as "comprehensive" universities: Mississippi State University, the University of Mississippi, and the University of Southern Mississippi.[10] Jackson State University, an HBCU, is the only institution designated by the Board as "urban." The urban designation defines the school's role as "one oriented toward service of the urban community, that is, the City of Jackson."[11] The remaining HWIs, Mississippi University for Women and Delta State University, and the remaining HBCUs, Alcorn State University and Mississippi Valley State University, have been designated as "regional" universities. *Id.* at 1540.[12]

B. State Funding

The Board of Trustees has historically underfunded the Black institutions in order to maintain a segregated public school system. *Ayers II*, 893 F.2d at 741. At the trial level, the district court judge found that the Board of Trustees employs a "funding formula" to determine the appropriate level of state appropriations for each of the institutions. *Ayers I*, 674 F. Supp. at 1546. However, the historical disparities in funding have created a great dis-

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[10] The comprehensive designation implies "that these institutions offer . . . the greater number and higher level of degree programs . . . [and] that each institution [is] expected to offer a number of programs on the doctoral level but not in the same disciplines. Leadership responsibilities in specific disciplines have been assigned to each comprehensive university in order to promote program quality and the efficient utilization of limited resources." *Ayers I*, 674 F. Supp. at 1539.

[11] The mission designated for Jackson State University is "to provide instruction in research and public service with particular emphasis on the needs of the urban community in which it is located." *Ayers I*, 674 F. Supp. at 1539-40.

[12] The regional designation "signifies a more limited programmatic focus for these institutions, that is, each is expected to restrict course offerings to quality undergraduate instruction." *Id.*

advantage for the HBCUs and their students, and the funding formula never has been revised to remedy the current effects of that past discrimination. Consequently, the three white "comprehensive" universities have, continue to receive and spend more money on a per student basis.[13]

C. Program Offerings

The *Ayers I* court also found that the three white "comprehensive" universities offer more academic programs than the HBCUs. *Ayers I*, 674 F. Supp. at 1538-39. Despite the intentions of the Board of Trustees to increase the number of academic programs at the HBCUs as outlined in the Plan, the HBCUs offer only 6.2%, or 24 of the 388 graduate programs that exist system wide. *Ayers II*, 893 F.2d at 739.

D. Facilities

The district court noted that the evidence showed that due to the state's formal segregation policies, the HWIs had received a disproportionate share of state funds allocated for facility expansion. *Ayers I*, 674 F. Supp. at 1548. The court determined the value of facilities at HWIs and HBCUs by calculating the replacement costs of each institution's facilities. The replacement value of the HBCUs was far less than the replacement value for the HWIs, due to the fact that historically, considerably more money has been spent on the HWIs. *Ayers II*, 893 F.2d at 742.

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[13] The general income received per student at the HWIs, on average, are as follows: $1,368 in 1960; $5,547 in 1980; and $8,934 in 1986. The general income received per student at the HBCUs, on average, are as follows: $699 in 1960; $4,354 in 1980; and $6,171 in 1986. The amounts spent by the HWIs per student, on average, are as follows: $1,351 in 1960; $5,412 in 1980; and $8,516 in 1986. The amounts spent by the HBCUs per student, on average, are as follows: $718 in 1960; $4,310 in 1980; and $6,038 in 1986. *Ayers II*, 893 F.2d at 741.

E. Faculty Composition and Salary

Just as the overall composition of the students enrolled in the Mississippi higher education system essentially is divided by race, so is the faculty. The Fifth Circuit ascertained that the percentage of Black faculty members at the predominantly white institutions in the 1985-86 school year ranged from 1.5% at the University of Mississippi to 5.0% at Delta State University. *Id.* at 737. In comparison, the percentage of Black faculty members at the HBCUs ranged from 67.3% at Jackson State University to 73.5% at Mississippi Valley State University. In addition, there was and continues to be a wide disparity between faculty salaries at Black and white institutions in Mississippi.[14] While the Board of Trustees' Plan reflected the Board's intention to secure funds from the legislature to hire more minority faculty, the legislature consistently "underfunded the Plan." *Id.* at 738. The racial composition of the faculty failed to dramatically change after the release of the Plan.[15]

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[14] During 1986-87, the average salaries at the HWIs were as follows: $30,757 at the University of Mississippi; $31,957 at Mississippi State University; $31,964 at the University of Southern Mississippi; $26,507 at the Mississippi University for Women; and $26,213 at Delta State University. During the same term, the average salaries at the HBCUs were as follows: $26,669 at Jackson State University; $21,291 at Alcorn State University; and $22,746 at Mississippi Valley State University. *Ayers II*, 893 F.2d at 737.

[15] The number of Black administrators at the HWIs was also scarce. By 1983, the percentage of Black administrators at the HWIs was as follows: 2.9% at University of Mississippi; 0.7% at Mississippi State University; 2.0% at University of Southern Mississippi; and 0% at Mississippi University for Women and Delta State University. The percentage of Black administrators at the HBCUs during the same year was as follows: 94.1% at Jackson State University; 96.7% at Alcorn State University; and 92.5% at Mississippi Valley State University. *Ayers II*, 893 F.2d at 738.

F. Satellite Campuses

Clearly, the Board of Trustees' interest in encouraging the growth and development of the HBCUs, and the advancement of Black college students enrolled in the state system and Black faculty employed in the system, never has been a priority. During the 1950s and 1960s, the Board of Trustees allowed the HWIs to open satellite campuses at locations in close proximity to two of the HBCUs.[16] The satellite campuses are in three Mississippi cities—Jackson, Natchez, and Vicksburg. In 1951, the Board of Trustees permitted the University of Mississippi to open Millsaps Center and allowed Mississippi State University to open Bellhaven Center. Both centers were located in Jackson, Mississippi in very close proximity to Jackson State University. These centers were consolidated in 1966, and became the University Center, a degree-granting institution. *Ayers I*, 674 F. Supp. at 1542. The establishment of the University Center deprived Jackson State University of potential student enrollment. The district court found that as of 1981, 76% of the baccalaureate degree programs, and 90% of the masters degree programs at Jackson State University were also offered at the University Center. *Ayers II*, 893 F.2d at 741.

The Board of Trustees continued these acts of discriminatory treatment against the HBCUs when in 1962, it allowed the University of Southern Mississippi to establish a resident center called the Natchez Center in Natchez, Mississippi, approximately forty miles from Alcorn State University. The Board of Trustees authorized the Natchez

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[16] As of 1971, fourteen of the existing thirty-three HBCUs in the country had "direct competition from HWIs located in the same cities and towns" duplicating some courses and drawing funds from the same state treasury. This common practice prevented many HBCUs from developing into full-service academic institutions like their predominantly white counterparts. *See* EGERTON, THE PUBLIC BLACK COLLEGES: INTEGRATION AND DISINTEGRATION 6-7 (1971).

Center to grant baccalaureate degrees in elementary and secondary education and business administration, courses which were also offered at Alcorn State University. *Ayers I*, 674 F. Supp. at 1543. In 1952, the Board of Trustees already had authorized Mississippi State University to establish a resident center called the Vicksburg Center at Vicksburg, Mississippi.

Amici submit that the conduct of the Board of Trustees, as evidenced by findings made by the federal courts, reflects a pattern of continuing discriminatory treatment against the HBCUs, and likewise against the Black students enrolled in the Mississippi public school system and the Black educators employed by the system. These continuing acts of discrimination demonstrate that the State of Mississippi, through the acts of the Board of Trustees, remain liable for its failure to provide adequate funding and resources for its HBCUs as it had done for its HWIs.

II. "A PUBLIC BODY WHICH HAS ITSELF BEEN ADJUDGED TO HAVE ENGAGED IN RACIAL DISCRIMINATION CANNOT BRING ITSELF INTO COMPLIANCE WITH THE EQUAL PROTECTION CLAUSE SIMPLY BY ENDING ITS UNLAWFUL ACTS AND DECLARING A NEUTRAL STANCE"[17]

The State of Mississippi in accordance with the mandate of this Court has an affirmative duty to correct its dual educational system of higher learning. That obligation cannot be accomplished by instituting so-called "good faith, race-neutral policies and procedures." Without correcting the present effects of past discrimination, the vestiges of the state's well-documented dual educational system are "grandfathered," and as a result, the Equal Protection guarantees of Black Mississippians are denied.

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[17] *Regents of the University of California v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part).

The Board of Trustees, vested with the management and control of the institutions of higher education,[18] contends that it has fully satisfied its obligation of not maintaining a dual educational system by adopting a Plan by which every student, regardless of race, may "freely" choose the school he will attend. Amici submit that continuing state government policies and institutional structures— as stated in Section I of this brief—have frustrated choices available to students in Mississippi, and hence, have made such choices other than free. Amici further submit that a cloud is cast over any "good faith" educational policy advanced by the Board of Trustees because history reveals that Black Mississippians have never fared well under the Board of Trustees' management of its "good faith" promise to ensure that Black Mississippians' Equal Protection rights are protected. *See* J. SCHOR, AGRICULTURE IN THE BLACK LAND-GRANT SYSTEM TO 1930, at 55-63 (1982) (Alcorn State University).

In *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954) (*Brown I*), the United States Supreme Court held that "[s]eparate educational facilities are inherently unequal." This principle, of course, is equally applicable to higher education. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956). *See also Brown I*, 347 U.S. at 493-94; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950); *Bakke*, 438 U.S. at 362.[19] Both

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[18] The Governor of Mississippi appoints the Board with the consent of the state senate. *Meredith v. Fair*, 305 F.2d 343, 348 (5th Cir. 1962) ("[T]he Board, a constitutional body, is vested with the management and control of all Mississippi's colleges and universities, including the Negro colleges."); *See also* MISS. CODE § 6724 (1942).

[19] In *Bakke*, the Court recognized that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identifiable discrimination. [The] school desegregation cases [attest] to the importance of this state goal. . . ." *Id.* at 307.

this Court and the Fifth Circuit have confirmed the urgency of desegregating institutions of higher learning. *See Florida ex rel. Hawkins*, 350 U.S. at 414; *Meredith*, 305 F.2d at 352 ("[a]s a matter of law, the principle of 'deliberate speed' has no application at the college level; time is of the essence.").

This Court first addressed the substantive remedial duty imposed on state public bodies that maintained a *de jure* racial segregation in their public schools in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).[20] That duty under the command of the Fourteenth Amendment has been reemphasized in subsequent opinions of this Court. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979); *See also Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (holding that school boards have a continuing duty to eliminate racial duality). More recently, this Court affirmed the principle that state public bodies have a substantive remedial duty to remove racial segregation in their schools. *Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S.Ct. 630, 638 (1991).

This Court, however, has yet to determine if post-*Brown* remedial cases apply in the context of higher education. Amici respectfully submit that they should.

This Court has at least two approaches to meet the desegregation mandate of the Fourteenth Amendment. The first approach is akin to the State of Mississippi's "good faith, race-neutral policies and procedures," referred to by one author as the "prohibitory conception" approach. This approach "accepts the anti-discrimination principle as the definition of wrongful conduct . . . but it views the goal of anti-discrimination laws as simply stopping new violations[,

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[20] As a preliminary matter, Amici's support of the remedial lessons advanced by this Court in *Green* is solely for the purpose of showing why a school board cannot wrap itself under a "freedom of choice" banner and avoid the constitutional obligation to affirmatively eliminate vestiges of a dual educational system.

but no more.] It is completely future-oriented." Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986) (*Choice in the Transition*). In other words, the State of Mississippi views this Court's desegregation mandate as only requiring prevention of new violations under the Equal Protection Clause. The State of Mississippi's view is problematic because it operates *in futuro*, and therefore, if it is sanctioned by this Court, it would grandfather vestiges of the existing dual system as exemplified by mission statements, and other actions by the Board of Trustees and the state as identified elsewhere in this brief. Amici respectfully request that the Court reject this approach and its approval in *Ayers I* and *Ayers III*, respectively.

This Court has more appropriately adhered to a "corrective conception" approach in desegregation cases, which Amici submit should be applied in the case *sub judice*. This approach "requires significant measures to eliminate the ongoing effects of discrimination; it requires remedial intervention that goes beyond the prohibitions of the anti-discrimination principle itself, since merely assuring prospective adherence to that principle will not undo the continuing effect of past violations." *Choice in the Transition*, *supra*, at 731. *See also Green*, 391 U.S. at 438 n.4 (*quoting Louisiana v. United States*, 380 U.S. 145, 154 (1965)); *Board of Education of Oklahoma City Public Schools*, 111 S.Ct. at 638; *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part).[21] In other words, under the "corrective conception" approach, this Court's desegregation mandate requires the State of Mississippi to do more than merely stop future violations of the Equal Protection Clause, since merely assuring prospective adherence to that principle

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[21] The existence of a dual education system, while never admitted by the State of Mississippi, is evident as Amici have spelled out elsewhere in this brief. *See also Meredith*, 305 F.2d at 360.

will not undo the well-documented and continuing effects of past Equal Protection Clause violations by the State of Mississippi. *Ayers II*, 893 F.2d at 734.

Green is instructive on how the corrective conception approach operates in the face of a "freedom of choice" plan advanced by the political body charged as the caretaker of public education. In *Green*, the school board contended that it had opened its schoolhouse doors, once closed shut to Blacks, and therefore those Blacks had the freedom to choose which school to attend, and any ensuing segregation in the schools was by choice. In rejecting this contention, the Supreme Court intimated in its holding that social and economic factors, and the availability of other alternatives weighed strongly against favoring such a future-oriented approach to desegregation. *Green*, 391 U.S. at 440 n.5, 441-42.

The underlying reasons for which a future-oriented approach to dismantling a dual educational system was rejected in the elementary and secondary level are present in the case at bar; therefore, Amici submit that no different result is summoned at the post-secondary level. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971) (the Court rejected race-neutral methodology). Certainly, it was not choice that made freedom of choice plans unacceptable in *Green*. Rather, it was the fact that continuing government policies and institutional structures tainted those choices and made them other than free. *Cf. Choice in the Transition, supra*, at 741. Similarly, it is the continuing state policies and institutional structures that taint those choices for students in the case *sub judice*. Presently, no label of "good faith," the cornerstone of the State of Mississippi's argument, can undo the constitutional violations committed by the state because following the *Brown* decisions, the state promised to implement a "good faith" educational policy that assured Equal Protection rights for all Mississippians but its actions were to the contrary. *See Meredith*, 305 F.2d at

350.[22] Anything short of a "corrective conception" approach would serve as the catalyst for a surgical dismantling of HBCUs thereby leaving Black victims with reduced educational opportunities, while grandfathering the past discrimination of the State of Mississippi without a constitutional duty to correct past acts.

Amici also submit that the "freedom of choice" argument is illusory. Thus, this Court should reject respondents' attempt to seek safe harbor under *Bazemore v. Friday*, 478 U.S. 385 (1986), because that case is distinguishable. In *Bazemore*, a plurality of the Court, relying on a finding by the district court, held that the state was not responsible for the factors upon which people selected particular 4-H Clubs. *Id.* at 408. In the case at bar, the state is directly responsible for the discriminatory factors and funding patterns which distinguish one university from another and presently affects the choices students make in deciding which college to matriculate. As stated in Section I of this brief, assignment of missions and funding levels for the HBCUs and HWIs parallel the state's policy in pre-*Brown* days. Therefore, it stands to reason that if the vestiges of pre-*Brown* days exist at the college level, in a real way those factors affect students' choices in deciding which school to attend. Thus, "freedom of choice" exists in name but not in substance at the college level.

In analyzing the dichotomy of approaches to desegregation of institutions of higher education advanced by the

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[22] With respect to institutions of higher learning, the district court in *Meredith v. Fair*, 220 F. Supp. 224, 227 (S. D. Miss. 1962), took "judicial notice of Section 4065.3 of the Mississippi Code of 1942 as amended." It required the officers of the appropriate branches of government to use any lawful, peaceable or constitutional means to prevent compliance with the integration decisions of the Supreme Court of the United States. *Id.*

lower federal circuit courts,[23] Amici submit that the disposition of this case need not be pigeonholed solely in a *Green* or *Bazemore* posture given the declared value of HBCUs because "those two approaches are by no means mutually exclusive in the context of higher education." Petition for a Writ of Certiorari at 10, *United States of America v. Ray Mabus*, Nos. 90-1205, 90-6588, (S. Ct. Jan. 28, 1991). Amici also submit that "the action of Mississippi taken after abolition of *de jure* dual system—in particular, continuation of a racially-based admissions process and perpetuation of the dual system through program duplication of the historical black and historical white schools—substantially interfered with and thus impermissibly fettered [free] choice." *Id. Accord, Sweatt v. Painter*, 339 U.S. 634.[24] Therefore, the best way to assure that students'

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[23] *See generally Ayers III*, 914 F.2d at 686-95; *Ayers II*, 893 F.2d at 744-56; *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979).

[24] Black and white students who choose HBCUs are penalized when the state is permitted to tie funding to race-neutral policies which merely describe tangible historical differences between the schools for which the state is responsible. Black students who choose HWIs but would have chosen an HBCU had funding levels been equal or because of an environment free from racial discrimination are penalized also. It appears that only white students are offered the free choice of a higher education in relatively well funded institutions free of discrimination against them.

The First Amendment dimensions of the State of Mississippi's past discriminatory conduct are unmeasured and untold. The marketplace of ideas of faculty and students at HBCUs, and maybe white students originally barred by state law from attending them, has been trammeled. While, the district court stated in *Ayers I*, 674 F. Supp. at 1547, that "a State is not required to fund all educational institutions at the same level or . . . one at any particular level," the Court should determine whether any acts of the State violated the fundamental rights of Black citizens when it weakened their voices by underfunding HBCUs and strengthened the voices of white schools by enhanced funding. As a result of this confluent discriminatory conduct by the State of Mississippi under the First and Fourteenth Amendments and the present effects, Amici ask: Whose voices for truth, whose voices in the mar-

choices in selecting schools are free, in fact, is to insist on constitutional requirements that will undo the present day effects of the long history of discrimination. To leave the institutional remnants and fabric of inequality in place and require only future "freedom of choice" is to be blinded to the historical and institutional contexts in which students must make those choices. *Brown I*, 347 U.S. at 489, 492, 495.

To accept "freedom of choice" is to place the burden of remedying the constitutional violations by the State of Mississippi on the shoulders of the victims (students and faculty) who have no obligation to remedy the state's conduct, just to combat it. The constitutional burden should be on the public body responsible for public education to achieve nondiscrimination by removing the vestiges of a dual system. *See Green*, 391 U.S. at 441-42. Amici submit that there are few distinguishable parallelisms between the constitutional responsibilities of the agents of the state who manage public education at the elementary, secondary and higher education levels.

III. THIS COURT SHOULD GIVE GREAT WEIGHT TO THE FINDINGS OF PRESIDENTS, HEW, AND CONGRESSES THAT TO REMEDY THE EFFECTS OF PAST DISCRIMINATION IT IS IMPERATIVE TO ENHANCE HBCUS

> *"This Congress finds that . . . the current state of Black colleges and universities is partly attributable to the discriminatory action of the States and the Federal Government. . . ."* 20 U.S.C. § 1060 (3) (Supp. 1991).

Over the past twenty-two years, four Presidents, HEW, the federal agency enforcing Title VI of the Civil Rights

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ketplace of ideas have been and are presently being silenced? *See Healy v. James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' ").

Act of 1964, 42 U.S.C. §§ 2000d, 2000h-2, in educational programs, and Congresses, have advanced major national initiatives to strengthen HBCUs. Amici maintain that these national initiatives, and the historical and policy reasons that caused the federal government to make those initiatives, should be given great weight by this Court. Respectfully, Amici submit that as a matter of judicial review, it would be incongruous for the Court to adopt the State of Mississippi's race-neutral claim in the face of contemporary congressional findings and other government policy statements.

Ayers III held that Mississippi satisfies its constitutional duty to disestablish a system of *de jure* segregation in higher education by merely "discontinuing prior discriminatory practices and adopting and implementing good-faith race-neutral policies." *Ayers III*, 914 F.2d at 687. That holding is inconsistent with the national policy consensus as stated by Presidents, HEW, and the Congresses.

A. PRESIDENTIAL ACTIONS AND INITIATIVES

1. *The Nixon Administration.* In July 1969, twenty presidents of HBCUs united and petitioned President Nixon about the plight of HBCUs and sought relief from the federal government. Soon thereafter, the Nixon Administration issued a federal report which concluded that "the neglect of these institutions has persisted too long."[25] In response, HEW Secretary Finch acknowledged that the federal government had not always been sufficiently responsive to the needs of the HBCUs and noted that efforts to remedy that were under way.[26]

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[25] FEDERAL INTERAGENCY COMMITTEE ON EDUCATION, FEDERAL AGENCIES AND BLACK COLLEGES, FISCAL YEAR 1969 6-7.

[26] FEDERAL INTERAGENCY COMMITTEE ON EDUCATION, FEDERAL AGENCIES AND BLACK COLLEGES, FISCAL YEARS 1972 & 1973 1.

President Nixon's message to Congress in February 1971 included a section labeled "Special Help to Black Institutions" which stated:

> Colleges and universities founded for black Americans are an indispensable national resource. Despite great handicaps they educate substantial numbers of black Americans, thereby helping to bring about a more rapid transition to an integrated society.
>
> Black institutions are faced with an historic inadequacy of resources. To help these institutions compete for students and faculty with other colleges and universities, the combined help of governments at all levels . . . must be summoned.[27]

The President proposed reforms in student aid programs that would "significantly aid students at black institutions," special efforts to assist Black colleges through the National Foundation for Higher Education and additional funds for Black colleges in programs administered by the United States Office of Education, the National Science Foundation, and the Department of Agriculture.[28]

2. *The Carter Administration.* President Carter issued Executive Order 12232,[29] the first of three Executive Orders issued by successive presidents mandating specific, affirmative initiatives by the federal government to enhance the education provided students at HBCUs. President Carter's Executive Order required the Secretary of Education to eliminate the "barriers which may have unfairly resulted in reduced participation in, and reduced benefits from, Federally sponsored programs" and to iden-

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[27] President's Message to Congress on Expanding Opportunities in Higher Education, 7 WEEKLY COMP. PRES. DOC. 282-83 (Mar. 1, 1971).

[28] *Id.* at 283.

[29] 3 C.F.R. 274 (1980 Comp.), *reprinted in* 1980 U.S. Code Cong. and Admin. News 787.

tify the legal authority under which the Departments "can provide relief from the specific inequities and disadvantages . . . in the agency programs."[30]

3. *The Reagan Administration.* In his first year in office, President Reagan issued Executive Order 12320.[31] It required each Executive Department, and agencies designated by the Secretary of Education, to develop annual plans to achieve a "significant increase" in the participation of HBCUs in federally sponsored programs. It directed the Secretary of Education to review the plan of each agency and to develop a comprehensive "Annual Federal Plan for Assistance for Historically Black Colleges" to be submitted to the Cabinet Council on Human Resources. The Order broke new ground by requiring the Secretary of Education to stimulate initiatives from the private sector to strengthen the management, financing and research of HBCUs. To coordinate overall planning and gather statistics from federal agencies, the Secretary of Education created the Office of White House Initiatives in the Department of Education. President Reagan's policies derived from his Administration's position that the HBCUs were "a national resource" and from the President's personal view that HBCUs hold an "unparalleled" place in American history.[32]

4. *The Bush Administration.* Within the first 100 days of his Administration, President Bush signed the most

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[30] *Id. See also* United Negro College Fund, 1978 PUB. PAPERS 2003-04 ("We have an obligation . . . to overcome some of the handicaps that have been inflicted on these people in the past.").

[31] 3 C.F.R. 176 (1981 Comp.), *reprinted in* 20 U.S.C.A. § 1060 (West 1990).

[32] *Id. See also* Memorandum for the Heads of Executive Departments and Agencies, 23 WEEKLY COMP. PRES. DOC. 852 (July 24, 1987) (Reagan acknowledges that education of Black youth "is key to their personal economic success and the growth of the American economy."). *See also* Curwood, *Black Colleges Draw New Interest*, Boston Globe, May 18, 1986, at 1, col. 1.

comprehensive, far-reaching Executive Order dealing with HBCUs in history. Noting that the HBCUs were "a special part of our heritage" and had supported a "noble educational tradition," Executive Order 12677[33] mandated an extensive set of federal requirements dealing with institutional finances, planning and management and the development of students, faculty and curriculum.[34] The Order was unprecedented in the breadth of the initiatives it established. In declaring that he issued the Order "to advance the development of human potential . . .," President Bush, like his predecessors, appreciated that the beneficiaries of these initiatives were not institutions, but the students served by the institutions.

B. HEW'S POLICY INITIATIVES THROUGH TITLE VI

For more than two decades, HEW's Office of Civil Rights ("OCR") has advanced standards and criteria for the enforcement of Title VI that consistently rejected the respondents' position in the instant case. Between January 1969 and February 1970, OCR determined that ten states, including Mississippi, were operating segregated systems of higher education in violation of Title VI. *Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973). OCR notified the states of its finding and requested by letter that they submit desegregation plans and indicated that:

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[33] 3 C.F.R. 222 (1989 Comp.), *reprinted in* 20 U.S.C.A. § 1060 (West 1990).

[34] *Id.* The Order created a Board of Advisors on HBCUs to advise the Secretary of Education, the President and the HBCUs in planning and implementing programs to enhance the quality of education at HBCUs. As in Executive Order No. 12320, 3 C.F.R. 176 (1981 Comp.), this Order provided for endowments from the private sector. The Secretary of Education and the Board of Advisors were ordered to develop alternative sources of faculty talent. Finally, the Director of the Office of Personnel Management was ordered to develop a program to improve recruitment of graduates of HBCUs for employment in the federal government.

> Educational institutions which have previously been legally segregated have an affirmative duty to adopt measures to overcome the effects of past segregation. To fulfill the purposes and intent of the 1964 Civil Rights Act it is not sufficient that an institution maintain a nondiscriminatory admissions policy if the student population continues to reflect the formerly de jure racial identification of that institution.[35]

Hence, for over twenty years, the federal government has rejected the ideas that state systems of higher education formerly segregated by law, fulfilled their obligations under Title VI by merely imposing admissions requirements that were racially neutral.

In response to HEW's letters, the states either failed to submit plans or submitted plans which HEW rejected. However, HEW took no administrative enforcement action until Judge Pratt of the District Court of the District of Columbia ordered the agency to take appropriate action against the states. *Id.* at 97-99. The Court of Appeals for the District of Columbia Circuit affirmed *en banc*, noting the need for statewide plans that took "into account the special problems of minority students and of black colleges . . ." and recognized that "black institutions currently fulfill a crucial need and will continue to play an important role in black higher education." *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973).

In 1973 and 1974, in response to Judge Pratt's initial order, HEW again sent letters to ten states' systems of higher education. *Adams v. Califano*, 430 F. Supp. 118, 119 (D.D.C. 1977). In those letters, HEW required the states to desegregate the student body, faculty and staff of each institution, eliminate curriculum duplication and develop specializations at HBCUs that would foster de-

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[35] DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES 6 (J. B. Williams, III ed. 1988).

segregation and to provide HBCUs the resources to overcome past discrimination and to attract all people. Pacht, *The Adams Case: An HEW Perspective*, 22 How. L. J. 427, 435 n.35 (1979). In 1977, the district court ordered HEW to develop final guidelines that would identify the necessary ingredients of a higher education desegregation plan and contain "specific requirements [to] which the states must respond to . . ." *Adams v. Bell*, No. 81-1715, slip op., at 17 (D.C. Cir. 1981) (dissent).

HEW issued its "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education" in 1978. 43 Fed. Reg. 6658 (1978) ("Criteria"). The Criteria remain the most comprehensive and elaborate statement by the federal government of the desegregation requirements in higher education. In its Criteria, HEW reaffirmed, for the third time in eight years, that Title VI required more from the states than merely ending *de jure* discrimination and permitting all students to be admitted to any state institution irrespective of race.

The Criteria acknowledge the unique role of HBCUs. It notes that more than 80% of Black college graduates were trained at HBCUs and that HBCUs continued to graduate nearly 40% of all Blacks who receive college degrees. *Id.* at 6660.[36] Consequently, in desegregating it was necessary "to guard against the diminution of the higher educational opportunities for black students [and] to take into account the unique importance of traditionally black colleges . . ." *Id.* To that end, the Criteria required that desegregation "be preceded by the accomplishment of specific steps to strengthen the role of traditionally black institutions, eliminate program duplication [and] locate new programs at black institutions. . . ." *Id.* at 6662.

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[36] *See also* Remarks at a White House Luncheon for Officials of Black Colleges and Universities, 17 WEEKLY COMP. PRES. DOC. 978 (Sept. 21, 1980) (Reagan's statement on how the commerce of the Nation has been enhanced by the existence of HBCUs and their graduates).

Part I of the Criteria provided that an acceptable desegregation plan will commit the state to assuring "that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation." *Id.* at 6661-62. As such, acceptable desegregation plans would include: a mission that is not based on race, efforts to eliminate unnecessary program duplication, "priority consideration" for assignment of new degree programs to HBCUs and develop specific measures to reassign particular programs, course offerings, resources or services among the institutions or merging institutions or branches of institutions. *Id.*

Parts II and III were just as comprehensive. Part II required the states to commit to affirmative goals in educating Black youth. Part III called for far-reaching measures to desegregate faculty, administrative staffs, non-academic personnel and governing boards like the State of Mississippi's Board of Trustees. *Id.* at 6662-63.

There is precedent, from the experience in elementary and secondary school desegregation, for federal courts to give great weight to the Title VI standards. In 1965 and 1966, subsequent to the passage of Title VI, HEW announced desegregation "Guidelines" for elementary and secondary education. The most significant judicial interpretation of those standards is provided in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (*en banc*). The Fifth Circuit declared, "[I]n determining whether school desegregation plans meet the standards of *Brown* and other decisions of the Supreme Court, [ ] courts should give "great weight" to HEW Guidelines. Such deference is consistent with the exercise of traditional judicial powers and functions. . . ." *Id.* at 847.

For similar reasons, in the instant case, this Court should also give "great weight" to the policies of the federal executive branch under Title VI. To do so would be to

recognize the expertise of the executive and the delegated authority by Congress in this area.

C. CONGRESSIONAL INITIATIVES THROUGH TITLE III

Congress has been an active policy-maker in the national effort to enhance educational opportunities for students at HBCUs because it, too, has acknowledged that "past discrimination action of the States and the Federal Government has contributed to the weak position of many HBCUs." Higher Education Amendments of 1986, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2593. Recognizing the importance of HBCUs such as those in Mississippi, Congress passed and President Lyndon B. Johnson signed the Higher Education Act of 1965, 20 U.S.C. § 1001 (1965) (Title III), to provide direct aid to higher education.[37] The purpose of the Act was "to strengthen the educational resources of our colleges and universities to provide financial assistance for students in postsecondary and higher education." H. R. Rep. No. 9567, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1230.

Congress has appropriated federal funds for HBCUs to improve the academic quality of programs, faculty performance, fiscal stability, administrative management, and to acquire equipment, and increase self-sufficiency. *See* 20 U.S.C. § 1057(a) (Supp. 1991). HBCUs like Mississippi's Alcorn State University have demonstrated that with Title III funds, HBCUs make significant improvements in the quality of education they provide. *See Hearings Before Subcommittee on Postsecondary Education of the Committee on*

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[37] The first time Congress attempted to assist Black colleges was in the 1800s when Congress required that appropriated funds be distributed to Black colleges on a "just and equitable basis." Unfortunately, this effort, embodied in the Morrill Act of 1890, 7 U.S.C. § 301 (1890), did little to spur or to stimulate movement for the education of Blacks. *See also* J. SCHOR, AGRICULTURE IN THE BLACK LAND-GRANT SYSTEM TO 1930 121-26, 154 (1982).

Education and Labor, 99th Cong., 1st Sess. 287-89 (1985). Congress made a finding that HBCUs make significant contributions toward equal opportunity in post-secondary education for not only Black students but also for low income and educationally disadvantaged Americans. 20 U.S.C. § 1060 (Supp. 1991). Even after it promulgated Title III in 1965, Congress opined that HBCUs were not receiving a "fair share" of available funds. 1985 U.S. Code Cong. and Admin. News 2591.

Amici submit that great deference should be given to the findings of the legislative and executive branches of government that the present day effects of past discrimination require efforts to enhance HBCUs. Amici also emphasize the importance of this Court's decision with the wise words of Herbert Ordre Reid, Sr., who has urged other courts to ensure

> the preservation of black institutions . . . [for] the education of black people who have been the subject of this dual system. . . . [W]e have a great potential here of dismantling, disabling the traditional black institution, . . . I hope whatever relief this Court sees fit to grant will require some special attention to the education of black people . . . and that we not move mechanically to something that looks good on paper, sounds like equality, but in fact will close the door to education for black people.[38]

Amici strongly believe that on the record, *Ayers III* was improperly decided and that it should be reversed. How-

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[38] *Equal Opportunity in Higher Education*, *supra*, at 33-34 n.17 (quoting Transcript of Hearing at 50-52, *Adams v. Califano*, 430 F. Supp. 118, 120 n.1 (D.D.C. 1977) (No. 3095-70)). *See also* Edley, *For Black Colleges*, Wash. Post., Dec. 2, 1985, at A23, col. 5; Gilliam, *Problems of Black Colleges*, Wash. Post., Nov. 17, 1986, at B3, col. 4; Tollett, *Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices?* 3 BLACK L. J. 162 (1974).

ever, should the Court remand the case *sub judice* in the manner of *Board of Education of Oklahoma City Public Schools v. Dowell*, then the State of Mississippi should be specifically assigned the burden of demonstrating that its past discriminatory conduct has no more than a *de minimus* present effect. The applicable standard requires "a school system clean of every residue of past discrimination." *Ross v. Houston Independent School District*, 699 F.2d 218, 255 (5th Cir. 1983). The assignment of the burden of proof to meet this standard is stated in *Brown v. Board of Education of Topeka*, 892 F.2d 851, 859 (10th Cir. 1989).

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse.

Respectfully submitted,

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